

## DONATION AGREEMENT

This DONATION AGREEMENT ("Agreement") is entered into effective as of OCTOBER 16, 2017 ("Effective Date") by and between McLane PACIFIC, INC., a \_\_\_\_\_ corporation, ("McLane") and City of Merced, a CA. Charter Municipal Corp ("Recipient"). McLane and Recipient shall also be referred to individually as "Party" and collectively as "Parties."

WHEREAS, McLane desires to donate to Recipient at no cost and on a non-exclusive basis, food and non-food products ("Donated Products") for charitable use; and

WHEREAS, Recipient desires to receive and distribute Donated Products in strict conformance with applicable federal, state and local laws which shall expressly include all laws which limit the liability of McLane in making such donations;

NOW THEREFORE, In consideration of the promises contained herein, the Parties agree as follows:

**1. Donated Product Description and Condition.** Recipient shall assume all responsibility to determine whether the Donated Products are fit for their intended use. McLane states that Donated Products may contain food items which no longer meets Federal, State and/or local quality and labeling standards, and that brand names may have been removed from, or obscured upon, labels associated with the Donated Products. Recipient acknowledges that it is knowledgeable of the applicable standards and capable of determining which Donated Products meet those standards. Furthermore, Recipient agrees that it is capable of and shall be solely responsible for the reconditioning of any Donated Products, if necessary.

**2. Restrictions on Marketing, Sales and Use of Donated Products.** Recipient agrees to observe and comply with the following restrictions governing marketing, sale, serving and use of Donated Products:

(a) Recipient will not publicly advertise, list or publicize the Donated Products as being products of McLane or any McLane customer.

(b) Recipient may provide Donated Products to subsequent donor organizations who serve the Donated Products to ultimate user, provided that 1) such subsequent donor organizations agree not to advertise or identify the Donated Products as belonging to McLane or any McLane customer, 2) notwithstanding a nominal fee collected by Recipient, all Donated Products shall be provided to the subsequent donor organization free of charge, and 3) the ultimate user of the Donated Products shall not be required to give anything of monetary value in exchange for the Donated Products.

(d) To the extent allowed by and strictly in accordance with applicable law or regulations, Recipient shall remove or permanently obscure any identifying logo, trademark or brand designation from the Donated Products before using them. McLane makes no representation that any law or regulation allows Recipient to remove or obscure such logos or designations, and Recipient hereby agrees to indemnify, defend and hold harmless McLane against any claim or assertion of any kind or character whatsoever that any such action is not or was not in accordance with any standard, regulation or other legal requirement.

(e) Recipient agrees that Donated Products will no longer be used at such time, if any, as they become unfit for consumption within a reasonably anticipated consumption period.

**3. Destruction or Disposal.** In the event Recipient or a permitted subsequent donor organization is unable to use the Donated Products within the requirements of this Agreement, Recipient or such subsequent donor organization shall be solely responsible for the destruction or disposal of the Donated Products at Recipient's or subsequent donor organization's sole expense, in a confidential and respectful manner that would bring no adverse publicity to McLane or any McLane customers. Such destruction or disposal shall be conducted in a lawful and responsible manner.

**4. Product Recall.** If a product defect requires McLane to make a product recall or to issue a product warning, Recipient shall assist McLane and shall take all measures which have been ordered by McLane and which the Recipient can reasonably be expected to perform. Recipient shall inform McLane without undue delay of any risks in the use of the Donated Products and possible product defects of which the Recipient becomes aware.

**5. Independent Contractor.** At all times during the term of this Agreement, Recipient and Recipient's employees will be considered independent contractors and not employees or agents of McLane. Neither Recipient nor its employees will hold themselves out as or attempt to function as an agent or employee of McLane. Nothing in this Agreement shall be construed as creating a partnership or joint venture of any kind between the Parties or as appointing either as agent for the other for any purpose and neither shall have the authority to bind the other or to contract in its name for any purpose.

**6. Publicity.** Each of the Parties may accurately publicize the fact that McLane is donating Donated Products to Recipient; provided, however, that Recipient shall obtain prior approval from McLane concerning the details of such publicity, and provided further, that McLane shall be entitled to make the first announcement of this relationship and the activities contemplated by this Agreement. Concerning such initial announcement, Recipient agrees to make all reasonable efforts to participate in the manner requested by McLane in a joint announcement, if so requested by McLane, and to make its representatives and facilities available as needed to conduct the joint announcement at any reasonable site designated by McLane.

**7. Warranties by McLane.** McLane warrants that it owns the Donated Products and has the unencumbered right to donate the Donated Products to Recipient upon the terms herein contained.

**8. DISCLAIMER OF ALL OTHER WARRANTIES BY MCLANE.** EXCEPT FOR THE EXPRESS WARRANTIES STATED HEREIN, MCLANE DISCLAIMS ALL WARRANTIES ON THE DONATED PRODUCTS FURNISHED UNDER THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, ALL IMPLIED WARRANTIES OF MERCHANTABILITY,

SUITABILITY, AND FITNESS FOR A PARTICULAR PURPOSE.

#### **9. Warranties by Recipient.**

(a) **Necessary Skills.** Recipient warrants that it is knowledgeable of the standards to properly recondition the Donated Products and that it and each of its employees performing services hereunder has and shall maintain during the term of this Agreement the necessary training, skills, qualifications, licenses, permits and registrations required for Recipient and its employees to perform services.

(b) **Compliance with all Laws.** Recipient acknowledges and agrees that it is responsible for and that it shall ensure all services performed by Recipient's employees on property belonging to or under the control of McLane are in compliance with any and all applicable laws, including, but not limited to, the U.S. Department of Transportation ("DOT") and the Federal Motor Carrier Safety Administration ("FMCSA") regulations.

(c) **Non-Profit Status.** Recipient warrants that it is a non-profit, 501(c)(3) tax-exempt organization qualified to receive tax deductible contributions. Recipient further agrees that all Donated Products received shall be used solely for purposes related to its tax-exempt status. Recipient also warrants that all Donated Products shall be made available without requiring anything of monetary value from the ultimate user.

(d) **Reconditioning Donated Products.** Recipient agrees to recondition any and all Donated Products to comply with all federal, state and local quality and labeling standards prior to the distribution or use of any Donated Products.

**10. Insurance.** Recipient shall at all times during the term of this Agreement maintain, at its sole cost, the following insurance coverage with insurance companies satisfactory to McLane:

(a) Comprehensive General Liability Insurance, including contractual liability coverage, with minimum limits of \$1,000,000 per occurrence and in the aggregate;

(b) Automobile Liability Insurance, with minimum combined single limit of \$1,000,000; and

(c) Umbrella/Excess Liability Insurance. Recipient may meet any or all of the foregoing requirements in this Section 10 (a)-(b) via a primary policy or the combination of primary and umbrella/excess. Each policy shall specifically name McLane Company, Inc., its parent and all subsidiaries, affiliates and divisions, as an additional insured. Prior to providing McLane with any services under this Agreement, Recipient shall furnish to McLane a current written insurance certificate obtained from Recipient's insurance carriers showing that such insurance coverage has in fact been procured, and is being properly maintained. Each insurance policy maintained pursuant to this provision shall remain current and in force while Recipient is performing services for McLane. McLane shall have no duty to confirm the receipt or sufficiency of such insurance certificates.

**11. RELEASE AND INDEMNITY.** EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, RECIPIENT SHALL, TO THE MAXIMUM EXTENT PERMITTED BY LAW, FULLY DEFEND, PROTECT, INDEMNIFY AND HOLD MCLANE, MCLANE COMPANY, INC., ITS PARENT, AND ALL THEIR

RESPECTIVE SUBSIDIARIES, AFFILIATES, AND DIVISIONS, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS (COLLECTIVELY, "MCLANE INDEMNITIES") HARMLESS FROM AND AGAINST ANY AND ALL COSTS, EXPENSES, AGENCY CHARGES, DEMANDS, SUITS, CLAIMS MADE BY REGULATORY AUTHORITIES, AND CAUSES OF ACTION OF EVERY KIND AND CHARACTER, INCLUDING JUDGMENTS, FINES, PENALTIES, DAMAGES, SETTLEMENT AMOUNTS, ATTORNEY'S FEES, COSTS OF INVESTIGATION AND LITIGATION, FOR INJURY TO OR DEATH OF, OR CLAIM BY, ANY PERSON, INCLUDING, BUT NOT LIMITED TO, RECIPIENT'S EMPLOYEES AND THIRD PARTIES, OR FOR DAMAGE TO OR LOSS OR DESTRUCTION OF ANY PROPERTY, CAUSED BY, ARISING OUT OF, IN CONNECTION WITH, OR IN ANY WAY INCIDENTAL TO, (I) BREACH OF ANY PROVISION OF THIS AGREEMENT BY RECIPIENT OR RECIPIENT'S EMPLOYEES OR THIRD PARTIES (II) THE NEGLIGENCE OR WILLFUL MISCONDUCT OF RECIPIENT, ITS EMPLOYEES OR THIRD PARTIES, EXCEPT TO THE EXTENT CAUSED BY OR ARISING OUT OF THE NEGLIGENCE OR WILLFUL MISCONDUCT OF MCLANE INDEMNITIES, OR (III) THE PROVISION OF ANY SERVICES BY RECIPIENT OR RECIPIENT'S EMPLOYEES UNDER THIS AGREEMENT. IF THE DONATED PRODUCTS AND/OR MCLANE'S ACTIVITIES ARE NOT TO ANY EXTENT IN COMPLIANCE WITH THE LAWS AT THE TIME DONATED PRODUCTS ARE RECEIVED BY RECIPIENT, THE INDEMNITY SHALL NEVERTHELESS APPLY EXCEPT TO THE EXTENT THAT, DESPITE RECIPIENT'S PERFORMANCE UNDER THIS AGREEMENT, SUCH LACK OF COMPLIANCE WAS THE SOLE CAUSE OF THE INDEMNITY OBLIGATIONS. THIS INDEMNITY OBLIGATION OF RECIPIENT SHALL APPLY TO ANY LIABILITY IMPOSED UPON MCLANE INDEMNITIES AS A RESULT OF ANY STATUTE, RULE, REGULATION OR THEORY OF STRICT LIABILITY. THE INDEMNITY PROVISIONS HEREOF ARE ENTIRELY SEPARATE AND DISTINCT FROM, AND INDEPENDENT OF, THE INSURANCE PROVISIONS HEREOF, AND IT IS NOT INTENDED THAT THE INDEMNITY AND INSURANCE PROVISIONS BE CONSTRUED TOGETHER, NOR IS IT INTENDED THAT THE INSURANCE PROVISIONS SHALL LIMIT, RESTRICT, DIMINISH OR OTHERWISE MODIFY THE INDEMNITY PROVISIONS, WHETHER BY LIMITATION OF THE EXTENT OF PROTECTION AFFORDED TO MCLANE INDEMNITIES OR OTHERWISE.

**12. Term and Termination.** The term of this Agreement is for a period of two years beginning on the Effective Date. This Agreement may be terminated by either Party at any time with seven (7) days prior written notice to the other Party.

**13. Notice.** Any notices required to be delivered under this Agreement shall be in writing and sent either (i) by certified mail, return receipt requested, (ii) by overnight courier service guaranteeing next business day delivery, or (iii) by confirmed fax, and all notices shall be addressed as follows:

If to Recipient:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If to McLane:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

With a copy to:  
McLane Company, Inc.  
4747 McLane Parkway  
Temple, Texas 76504  
Attn: General Counsel

Either Party may change its address for notice purposes by giving written notice of such change as set forth above.

**14. Survival.** The warranties, insurance, release and indemnity, restrictions on marketing, sales and use of Donated Products, product recall, destruction or disposal and governing law provisions shall survive termination of this Agreement without limit as to time.

**15. Severability.** Should any provision of this Agreement or portion thereof be declared invalid, void or unenforceable, it shall not affect the validity or enforcement of the remaining provisions or portion thereof which shall remain in full force and effect as if this Agreement has been executed without such invalid, void or unenforceable provision or portion thereof having been included.

**16. Waiver.** No failure, forbearance, neglect or delay of any kind or extent on the part of McLane in connection with the

enforcement or exercise of any rights under this Agreement shall affect or diminish McLane's right to strictly enforce and take fully benefit of each provision of this Agreement at any time and for any purpose.

**17. Entire Agreement; Modifications.** This Agreement constitutes the entire agreement of the Parties with regard to its subject matter and supersedes all previous written or oral agreements and understandings between the Parties with regard to that subject matter. No modification of or amendment to this Agreement will be effective unless made in writing and signed by both Parties.

**18. No Assignment.** Recipient may not assign this Agreement without McLane's prior written consent and any attempted assignment without McLane's prior written consent shall be void. Recipient may not subcontract the provision of all or part of the services without the prior written consent of the McLane.

**19. Governing Law.** This Agreement shall be governed by the laws of the State of Texas without regard to the conflicts of laws principles that may be applicable.

**20. Authority.** The undersigned individual executing this Agreement on behalf of Recipient represents that he/she is an employee of Recipient and/or is duly authorized to enter into this Agreement for purposes of binding Recipient to the terms and conditions herein. The Parties agree that faxed transmissions are considered originals, including signatures.

**IN WITNESS WHEREOF,** the Parties have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date first stated above.

**MCLANE** \_\_\_\_\_, INC.

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**RECIPIENT:**

City of Merced \_\_\_\_\_

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

200461  
FUNDS ACCOUNTS VERIFIED

*[Signature]*  
FINANCE OFFICE DATE  
*No funds to be encumbered*  
*10/5/17 RLP*  
*PC 10/6/17*  
**APPROVED AS TO FORM:**

*[Signature]*  
**KELLY C. FINCHER**  
Chief Deputy City Attorney